

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-1671

AUG 15 1974

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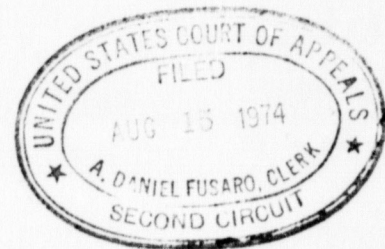
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. : 74-1671

FRANK TUBBS, PRO SE
APPELLANT

V.

UNITED STATES OF AMERICA
APPELLEE



REPLY BRIEF OF APPELLANT
FRANK TUBBS

Frank Tubbs, Pro Se
Reg. No. 37081-133-G
Post Office Box 33
Terre Haute, Indiana
47808

Counsel For Appellant
Frank Tubbs

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TABLE OF AUTHORITIES

Cases Cited

Price V. Johnson, Cal. 1948, 68 S. Ct. 1049, 334 U.S.
266, 92 L. Ed. 1356

Statutes Cited

Title 18 United States Code

Sections: 2113(a)
 2113(d)
 2113(c)
 F.R.C.P. Rule 29

Title 28 United States Code

Section: 2255

United States Constitution

Fifth Amendment

STATEMENT OF FACTS

On the 2nd, day of April, 1970, Appellant Tubbs was indicted by the Federal Grand Jury in New Haven, Connecticut on a Three Count indictment under the Federal Bank Robbery Statutes. Count One charged violation of 18 U.S.C. 2113 (a), subsections 2(a) and 2(b); this charge carries a \$5,000.00 fine or twenty (20) years imprisonment or both. Count Two charged violation of 18 U.S.C. 2113 (d), subsection 2(a) and 2(b); this charge carries a \$10,000.00 fine or twenty-five (25) years imprisonment or both as punishment under these statutes. Both 2113 (a) and 2113 (d) are charges for those persons who actually participates in the commission of a bank robbery. Count Three charged violation of 18 U.S.C. 2113 (c); this charge carries a punishment under this statute of a \$5,000.00 fine or ten (10) years imprisonment or both. This specific crime charged under 2113 (c) of the Federal Bank Robbery Statutes is a charge for those persons who are non-participants in the actual commission of a bank robbery but those persons who are the receivers of the proceeds from a robbery with knowledge of the fact that the proceeds were taken from a Federally Insured Financial Institution.

At the conclusion of trial the Court charged the Jury with all Three Counts enumerated in the indictment as it was returned from the Grand Jury.

At the conclusion of the charge to the Jury, the Court retired to its' chambers. During the Court's time in his cham-

bers the error in the charges by the Grand Jury were discovered.

The Court proposed to correct the error in the charges returned by the Grand Jury in a very unusual manner. The Court took a pair of scissors and literally "cut-off" Count Three from the original indictment and recharged the Jury.

The Court offered, in its' attempt to justify the amendment of the indictment, that the evidence was insufficient to sustain the Third Count of the indictment. (See Federal Rules Criminal Procedure, Rule 29)

The Jury then returned verdicts of guilty on the remaining Two Counts of the indictment. The sentence on Count Two was subsequently vacated by the District Court on motion to vacate pursuant to 28 U.S.C. 2255 combined with F.R.A.P. Rule 35. (See Appendix pp. 12 and 12-A; 13 and 13-A)

Court Appointed Attorney for Tubbs appealed the conviction not raising the present Constitutional violation therein. Appellant Tubbs thereafter filed two motions to vacate pursuant to 28 U.S.C. 2255. This issue was raised vaguely in Tubbs' first 2255 petition and was never granted a hearing. This issue was clearly raised in Tubbs' second 2255 petition.

Appellant Tubbs then resorted to the instant habeas corpus petition with the present issue submitted before the District Court without any accompanying issues. The District Court again denied Appellant Tubbs petition without a hearing

and cited lack of jurisdiction as the reason for so doing. On this occasion Tubbs appealed this decision to this Honorable Court of Appeals for The Second Circuit.

In Rebuttal to the Appellee's Response Brief, the relief sought by Appellant Tubbs in this action should be granted for the following reasons: to wit:

- I. The Appellee's Ruling on application for a writ of habeas (filed April 17th, 1974) and the Appellee's Brief (filed August 2nd, 1974) are filled with Contradictions, to wit:

(See App. pp. 15-A)

"The petitioner's application for habeas relief merely seeks to relitigate issues previously raised and rejected at trial, on appeal..."

Herein is one of the direct contradictions made manifest with the filing of the Appellee's Brief, to wit:

(See Brief of Appellee-United States of America)

- A. "Tubbs failed to raise the issue in the first instance on appeal..."

Herein is another direct quote from the Appellee's Ruling On Application for a writ of habeas corpus, to wit:

(See App. pp. 15-A)

"In any event, since petitioner is presently incarcerated in the United States Penitentiary at Terre Haute, Indiana, this Court lacks jurisdiction to grant him the post-conviction relief he seeks..."

Herein is the contradiction to that statement in the Appellee's brief, to wit:

(See Brief of Appellee-United States of America)

"Tubbs would have difficulty proceeding in Indiana because of the nature of his claims."

As to the allegation by the appellee that this issue was raised and rejected on two previous 2255 petitions on the merits of the issue, the records will clearly contradict this allegation. (See App. pp. 7-A and 11-A). The memorandum of decision fails to make any mention of this issue by the District Court with respect to both previously filed 2255 petitions.

Appellant Tubbs wishes to respectfully represent to this Honorable Court of Appeals that the Appellee's attempt to assign this issue as "trial error" is completely contradicted by the facts and records in this cause. The issue presented in this cause is clearly an issue of "Constitutional Magnitude" which constitutes "Constitutional Error".

ARGUMENT

Appellant Tubbs is alleging that:

1. The error in the charges enumerated in the Three Count indictment - (12,716) - were committed by the Grand Jury when they charged 2113 (c) on the same indictment with respect to 2113 (a) and 2113 (d).
2. And that the attempt by the District Court to correct this error by amending Count Three from the original indictment at the end of trial and after its' first charge to the Jury violated the Fifth Amendment of the Constitution of The United States of America. And substantially increased the punishment possible under the same indictment as it was returned by the Federal Grand Jury in that it removed Count Three 2113 (c) from the consideration of the Jury (the ten (10) year count), leaving 2113 (a) (the twenty (20) year count)

and 2113 (d) (the twenty-five (25) year count).

The facts and records completely substantiate the merits of Appellant Tubbs' claim.

As to the procedural "smoke screen" the Appellee is attempting to cloud this issue with regards to habeas corpus proceedings, the Supreme Court has clearly defined the purpose of habeas corpus proceedings in the following case, to wit:

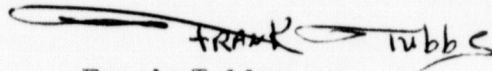
"The primary purpose of a habeas corpus proceeding is to make certain that petitioner is not unjustly imprisoned, and if for justifiable reason he was unable to assert his rights or was unaware of of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief. Price v. Johnson, Cal. 1948, 68 S.Ct. 1049, 334, U.S. 266, 92 L.Ed. 1356

CONCLUSION

WHEREFORE, Frank Tubbs, Appellant, Pro-Se, respectfully prays this Honorable Court of Appeals for the Second Circuit to:

1. Enter and hear this appeal in its' entirety on the face of its' merits, the records and facts submitted before this Court,
2. and that upon said hearing this petition be granted and Appellant Tubbs be released forthwith and for all further and complete relief in the premises be afforded.

Respectfully Submitted,

 Frank Tubbs

Frank Tubbs
Appellant, Pro-Se
Post Office Box 33
Terre Haute, Indiana 47808

SUBSCRIBED and SWORN to

before me this 12 day
of August, 1974.


United States Parole Officer

Authorized by the Act of July 7, 1937
16 (Revised) Code (18 U. S. C. 406a)

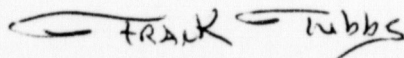
STATE OF INDIANA,)
)
COUNTY OF VIGO,) SS

PROOF OF SERVICE

I, Frank Tubbs, Appellant, Pro-Se, do hereby swear that on the 13th day of August, 1974, that I placed in the United States Mail, Registered, Air-Postage, Special Delivery, one copy of the foregoing attached Reply Brief of Appellant - Frank Tubbs, Docket No. 74-1671 to:

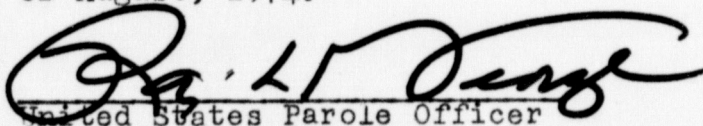
Officer of the United States Attorney
New Haven, Connecticut

06508

 FRANK TUBBS

FRANK TUBBS
Appellant Pro Se
Post Office Box 33
Terre Haute, Indiana
47808

SUBSCRIBED and SWORN to
before me this 12 day
of August, 1974.


United States Parole Officer

